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School of Law
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Coronavirus Research by the European Children's Rights Unit

The Coronavirus Act 2020 and Child Detention under the Mental Health Act 1983

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Coronavirus (COVID-19) #LivUniCOVID
Research and response

Briefing Paper #5

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Context

The Mental Health Act ('MHA') 1983 provides for the treatment of people with a mental disorder, a term which is broadly defined and includes eating disorders, anxiety disorder, depression and schizophrenia. There is no lower age limit applicable to the MHA and so it applies to children in the same way as adults, authorising their forced detention and treatment.¹ Sec. 2 MHA allows the child to be detained for 28 days and Sec. 3 permits detention for a period of six months.

Ideally, young people are offered assessment and any treatment needed in a community setting. Crisis point can be reached, however, if the young person is unable to access these services which can result in detention for assessment and treatment without the young person's consent. While efforts are being made to provide as much support as possible during the pandemic, State and Local Authority obligations towards children have been limited under the measures introduced by the [Coronavirus Act 2020](#).²

Children's Rights and Mental Health

The 2017 UN Human Rights Council [Resolution](#) on Human Rights and Mental Health sets out important steps to ensure that the rights of those with mental health conditions, including children, are upheld. This reflects the protections available under [the UN Convention on the Rights of the Child 1989](#), particularly children's rights to have a voice in decisions affecting them, (Art. 12) the right not to be separated from their parents (Art. 9) and the right to be protected from deprivation of their liberty (Art. 37).

¹ The Mental Health Act 2007 makes some amendments to the MHA 1983 and sets out: (i) A 16-17-year-old with capacity who refuses to be admitted for assessment and treatment can no longer be admitted on the basis of parental consent. So, the only way to detain the young person would be under the MHA 1983 (in effect from Jan 2008). And (ii) Children should be placed in age-appropriate accommodation (in effect from April 2010).

² Sec.10 of the 2020 Act encompasses the 'temporary modification of mental health and mental capacity legislation.'

The UK's failure to uphold these rights was highlighted in 2016 by the UN Committee on the Rights of the Child. It recommended in its [report](#) [at para 60] that the UK expedite the prohibition of placing children with mental health needs in adult psychiatric wards or police stations and put in place age-appropriate mental health services and facilities. The Committee further recommended that the UK review current legislation to ensure that the best interests and the views of the child are taken duly into account in cases of mental health treatment of children under the age of 16, particularly with regard to hospitalisation and treatment without the child's consent. The Committee also suggested that the UK focus on the support and development of therapeutic community-based services for children with mental health conditions to reduce the need for detention. The available evidence suggests that there has been little progress in the UK in implementing the recommendations to date.³

The Coronavirus Act 2020 and mental health detention of children and young people

The UNCRC Committee recommendations highlight the problems inherent in UK law on child detention under the MHA. The measures introduced by the Coronavirus Act 2020, set out here, are likely to compound the problems identified. These include:

- **An increased likelihood of reaching crisis due to limited mental health support**

The lockdown measures have limited children's access to vital support services with particular implications for young people with mental health needs. The organisation Young Minds recently undertook a [survey](#) involving 2111 young people with a history of mental illness. Of the young people surveyed, 83% agree that the coronavirus pandemic has made their mental health worse and 26% state they have been unable to access

³ See Bonnet, M and Moran, N. Why do approved mental health professionals think detentions under the Mental Health Act are rising and what do they think should be done about it? *The British Journal of Social Work* Volume: 50 Issue 2 (2020); Crouch L, et al. "Just keep pushing": Parents' experiences of accessing child and adolescent mental health services for child anxiety problems. *Child Care Health Dev.* 2019;45: 491–499; Witt, A et al. Child and adolescent mental health service provision and research during the Covid-19 pandemic: Challenges, opportunities and a call for submissions. *Child and Adolescent Psychiatry and Mental Health, [s.l.]*, v. 14, p.1-4, 2020

their usual support since the lockdown measures began.

- **Weakening of detention procedural safeguards**

The temporary modification of mental health legislation essentially weakens the protections afforded to those forcibly detained. Prior to the 2020 legislation, an individual could only be detained under the MHA on the application of a mental health professional, supported by two medical professionals if it was deemed necessary to protect the safety and health of the child, or others. The Coronavirus Act changes this requirement, allowing detention on the recommendation of one medical practitioner.⁴

It is recognised that the provisions are intended to ‘protect’ children and that a lack of access to treatment for the majority of children can often be more problematic than forced detention for the minority. Yet the weakening of the procedural protections should not be ignored, since the safeguards under MHA were introduced after the failure of previous legislation⁵ to uphold the rights of individuals detained against their will, many of whom should not have been detained and who went on to become [institutionalised](#).

- **Access to justice and appeals**

Young people wishing to challenge their detention can do so before a Mental Health Tribunal and are provided with the opportunity to share their views with the panel of decision-makers. The Coronavirus Act now allows the decision to be made by one person, rather than a panel of three and the Tribunal is no longer required to convene in person; cases can be decided ‘on paper.’⁶ The detained young person will be unable to meet the decision-maker which could have far-reaching consequences for young people detained under sec. 3 MHA, who are only entitled to apply to the tribunal every six months in the first year of detention and annually thereafter. Research indicates that [young people’s experiences of Mental Health Tribunals](#) were difficult before the legislative changes, the effect of

⁴ Sec 10. Schedule 8, Part 2 of the Coronavirus Act. Sch 8 applies to legislation in England and Wales, whereas Schedules 9-11 apply to legislative provision in Scotland and Northern Ireland.

⁵ The Madhouses Act 1832, The Lunacy Act 1890, The Mental Deficiency Act 1913, The Mental Treatment Act 1930 and The Mental Health Act 1959

⁶ N2

the Coronavirus Act is only likely to exacerbate the experience.

- **Child's voice**

The right of children to express their views on the care and treatment they receive is recognised in the [MHA 1983 Code of Practice](#), which provides “the child or young person’s views, wishes and feelings should always be sought, their views taken seriously and professionals should work with them collaboratively in deciding on how to support that child or young person’s needs” ⁷ Despite these aims, an independent review of the MHA 1983 and research by [leading charities](#) identify that children’s participation in mental health decision-making is very limited. Pressures arising from the pandemic are likely to further side-line children’s views, illustrated by the fact that the new measures allow young people to be excluded from the very Tribunal to which they would challenge their detention. Such measures go against Art 12 UNCRC and the guidance issued in [UN General Comment 12](#) on the right of children to participate in proceedings affecting them.

- **Contact visits with family members during lockdown.**

The [UNCRC Committee’s recommendations on Covid-19](#) [at para 7] highlight that the pandemic will intensify the vulnerabilities of children with underlying health conditions and children confined in secure care centres. The Committee recommends [at para 8] that “States release children in all forms of detention, whenever possible, and provide children who cannot be released with the means to maintain regular contact with their families.”

The lockdown measures introduced as a result of Covid-19 have inevitably limited the visits detained young people might otherwise receive from family and friends. While social distancing measures within mental health wards and units is one cause, the [independent review of the MHA 1983](#) published in December 2018 highlights that children detained under the MHA are more likely to be placed in units very far from their homes. These

⁷ Presented to Parliament pursuant to section 118 of the Mental Health Act 1983 and published by the government in 2015, p169

difficulties will compound the situation for young people living some distance away from their families, particularly given that travel is limited.

Conclusion

It is accepted that the changes arising from the Coronavirus Act reflect a situation of overstretched resources and public health concerns. Nevertheless, the discussion above highlights the disquiet by researchers and leading charities about children being detained when they could receive community-based treatment and the fact that young people should have a greater voice in decisions about their treatment. Consequently, any further watering-down of protections should be carefully monitored to ensure their use is proportionate, effective and is not prolonged in ways that breach children's rights.

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